

In the Matter of Merchant Mariner's Document No. Z-702365 and all other Seaman Documents  
Issued to: FRANCIS D. MURPHY

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1128

FRANCIS D. MURPHY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 13 October 1958, an Examiner of the United States Coast Guard at Seattle, Washington, suspended Appellant's seaman documents upon finding him guilty of misconduct. Two specifications allege that while serving as an able seaman on the United States SS KYSKA under authority of the document above described, on or about 3 September 1958, Appellant both failed to join and deserted his vessel at Pusan, Korea.

At the beginning of the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Although advised of his right to be represented by counsel of his own choice, Appellant voluntarily elected to waive that right and act as his own counsel. He entered pleas of not guilty to the charge and both specifications.

After the Investigating Officer had requested the taking of depositions, he and the Appellant conferred, at the suggestion of the Examiner, and agreed on several stipulations which are the primary basis for the findings of fact, infra, that are unfavorable to appellant's cause. These stipulations plus a written statement by the Master of the ship and entries in the Official Logbook constituted the entire case of the Government. The Examiner stated that this evidence established a prima facie case in proof of the specifications and asked Appellant whether he had any evidence to produce. Appellant replied in the affirmative but he did not testify under oath. However, at intervals during the hearing, he explained that he could not join the ship because he was in the hospital with a fractured skull on 3 September and he had asked the Army hospital authorities to notify the Master of the ship.

At the conclusion of the hearing, the Examiner announced the decision in which he concluded that the charge and two specifications had been proved. An order was entered suspending all documents, issued to appellant, for a period of six months on twelve months' probation.

FINDINGS OF FACT

On and before 2 September 1958, Appellant was serving as an able seaman on the United States SS KYSKA and acting under authority of his Merchant Mariner's Document No. Z-702365.

On 30 August, Appellant struck his head on a stanchion while engaged in a fight with Second Mate. Appellant demanded that the Master pay off either the Second Mate or Appellant. This demand was refused by the Master and Appellant took the matter up with the United States Consul at Seoul, Korea, on 2 September. After investigation, the Consul told Appellant to return to the ship and to stay on board. The matter of removing either of the seaman from the ship was left up to the discretion of the Master.

Appellant returned to the ship on the evening of 2 September. About 2345, he left the ship with his toilet articles. The Mate on watch was told by Appellant that he was leaving and would not come back. Shortly thereafter, Appellant was hospitalized for treatment at the U. S. Army Hospital in Pusan. The ship departed Pusan on the morning of 3 September as scheduled. The Master logged Appellant as a deserter. Appellant returned to the United States as a workaway on another ship.

Appellant has had eleven years' experience in the Merchant Marine Service without any prior record.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant should have been provided with counsel to present his defense that he was in a hospital prior to, and for sixteen days after, the ship's departure. The Investigating Officer improperly failed to disclose that he knew about Appellant's hospitalization and the Examiner did not give any consideration to Appellant's statements about his injury.

It is urged that the evidence does not support the findings of desertion or failure to join. It is requested that the Examiner's decision be reversed or that the case be remanded for the introduction of new evidence.

APPEARANCE: Francis J. Soolvin, Esquire, of San Francisco, California, of Counsel.

#### OPINION

It is my opinion that the evidence is not sufficient to support the specifications. Appellant's request that the case be dismissed will be granted rather than remanding it for further proceedings. Ordinarily, the latter procedure would be followed in order to obtain evidence on the vital element as to whether Appellant was capable of formulating a valid intent to desert the ship. But this will not be done because of the difficulties presented as a result of the length of time since the Examiner rendered his decision more than a year ago.

Concerning Appellant's failure to be represented by counsel at the hearing, he insisted

throughout that he wanted to go ahead without delay and that he would represent himself. The Examiner considered Appellant's statement that he had a fractured skull as evidenced by the fact that the Examiner commented on this statement in his decision. Also, Appellant's statement that he was hospitalized when the ship sailed is treated as a fact in the above findings despite his failure to testify under oath. However, the Examiner did not adequately protect the interests of Appellant by accepting oral stipulations read into the record by the Investigating Officer.

Under ordinary circumstances, Appellant's definite statement, to the Mate on watch, that he was not coming back to the ship would be satisfactory evidence of Appellant's intent to desert and his subsequent hospitalization would not be considered as retroactively condoning his prior desertion. But relative to this case, a letter has been received from the U. S. Army Hospital in Pusan corroborating Appellant's unsworn statements that he was hospitalized for sixteen days because of a fractured skull. This communication also lends support to Appellant's statements at the hearing that he could not remember, due to his injury, the events which occurred on the night he left the ship. The letter from the hospital states that such claimed amnesia might have been caused by Appellant's head injury. Although there is no evidence that Appellant departed the ship to seek medical treatment, he appeared to be rational and there was no outward, physical evidence of his injury, it is not unreasonable to accept the possibility that he was not capable of formulating the necessary intent to desert because of the impairment of his mental faculties by the blow on the head. This is indicated by his apparent state of amnesia.

For these reasons, the finding that the offense of desertion was proven is reversed and the specification is dismissed. The same considerations applied to Appellant's alleged failure to join indicate that he was not guilty of this offense. The finding is reversed and the specification is dismissed.

#### ORDER

The order of the Examiner dated at Seattle, Washington, on 13 October 1958, is VACATED.

A. C. Richmond  
Vice Admiral, United States Coast Guard  
Commandant

Dated at Washington, D. C., this 22nd day of December, 1959.